

STATE OF MICHIGAN  
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the complaint of the )	
<b>INDEPENDENT POWER PRODUCERS COALITION</b> )	
<b>OF MICHIGAN</b> against <b>CONSUMERS ENERGY</b> )	
<b>COMPANY</b> concerning violations of the Public )	
Utility Regulatory Policies Act of 1978, and )	Case No. U-17981
related Commission orders. )	
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At the July 12, 2017 meeting of the Michigan Public Service Commission in Lansing,  
Michigan.

PRESENT: Hon. Sally A. Talberg, Chairman  
Hon. Norman J. Saari, Commissioner  
Hon. Rachael A. Eubanks, Commissioner

**ORDER**

History of Proceedings

On November 4, 2015, the Independent Power Producers Coalition of Michigan (IPPC) filed a complaint against Consumers Energy Company (Consumers) alleging violations of the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 USC 2601 *et seq.* Specifically, under Count I of the complaint, IPPC alleges that Consumers is attempting to avoid its obligation under that law to enter into replacement power purchase agreements (PPAs) with IPPC members who have existing PPAs with Consumers.<sup>1</sup> IPPC is a coalition of independent power producers, and two of

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<sup>1</sup> The parties have agreed that only Count I remains to be adjudicated, because Counts II and III are being addressed in Case No. U-18090. 3 Tr 16-17, 28. Count I alleges that termination of the PPAs violates PURPA and Commission orders.

its members – Hillman Power Company, LLC (Hillman) and White’s Bridge Hydro Co. (White’s Bridge) – have existing PPAs with Consumers that were due to expire on May 31, 2017.<sup>2</sup>

On December 10, 2015, Consumers filed an answer.

A prehearing conference was held before Administrative Law Judge Mark E. Cummins (ALJ) on December 15, 2015. IPPC, Consumers, and the Commission Staff (Staff) participated in the proceeding wherein the parties agreed to delay the setting of a schedule until the second prehearing. On May 3, 2016, the Commission issued an order in Case No. U-18090, initiating a contested case proceeding for establishing an avoided cost method, and avoided costs for Consumers.

A second prehearing conference was held on May 10, 2016. In light of the commencement of Case No. U-18090, the parties agreed to hold this proceeding in abeyance while they pursued an agreement to dismiss this action without prejudice; however, the parties failed to come to such an agreement.

On October 18, 2016, IPPC filed a motion to amend its complaint and for a schedule to be set, to allow this matter to proceed. On November 4, 2016, Consumers filed a response and a motion to dismiss the complaint. On November 10, 2016, the ALJ granted the motion to amend the complaint, denied the motion to set a schedule, and denied the motion to dismiss.<sup>3</sup> 3 Tr 38-41.

On November 28, 2016, IPPC filed an application for leave to appeal the denial of the request to set a schedule, and on December 12, 2016, Consumers filed a response in opposition to the application. On January 31, 2017, the Commission issued an order (January 31 order) reversing

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<sup>2</sup> Hillman and Consumers and White’s Bridge and Consumers agreed to contract extensions until July 31, 2017. 5 Tr 139-140.

<sup>3</sup> The amended complaint includes additional allegations and adds entities to the list of IPPC members.

the ALJ and directing that he set a schedule for adjudicating Count I of the complaint. The Commission found specifically:

The Commission holds the authority under PURPA to determine the nature of Consumers' obligation to purchase [qualifying facility] QF power when it is offered. *See*, October 27, 2015 order in Case No. U-17973, pp. 2-5. The ALJ found that this proceeding should be held in abeyance indefinitely so that Consumers, Hillman, and White's Bridge could "work out an extension of some nature," and Consumers indicates that a new five-year contract has been offered. 3 Tr 40. However, the simple fact of an offer does not preclude the Commission from determining the merits of Count I of IPPC's complaint, nor does it ensure that passage of the May 31, 2017 deadline – and the inability to plan expenditures and investments in the meantime – will not result in significant harm to Hillman and White's Bridge.

January 31 order, p. 5.

IPPC and Consumers filed testimony and exhibits on March 17, 2017, and April 12, 2017, respectively. On April 17, 2017, IPPC filed rebuttal testimony and exhibits, and on April 25, 2017, IPPC filed revised direct testimony and exhibits. Also on April 25, 2017, Consumers filed a motion to compel discovery, and on May 1, 2017, IPPC filed a response in opposition to the motion.

On May 8, 2017, the ALJ conducted an evidentiary hearing and a hearing on Consumers' motion to compel. The ALJ granted Consumers' motion and, pursuant to the parties' agreement, all testimony and exhibits were bound into the record without cross examination. On June 2, 2017, IPPC, Consumers, and the Staff filed briefs. On June 23, 2017, IPPC and Consumers filed reply briefs. The record in this case consists of 153 pages of transcript and 18 exhibits admitted into evidence. The Commission agreed to read the record, dispensing with the need for a Proposal for Decision.

## Review of the Record

James Charles, Senior Director of Operations for Fortistar Biomass Group,<sup>4</sup> testified on behalf of IPPC regarding the harm to Hillman and other stakeholders if Consumers were permitted to unilaterally terminate the PPA with Hillman. Mr. Charles testified that the Hillman PPA began over 32 years ago and is scheduled to end on May 31, 2017. Mr. Charles stated that Hillman received a notice of termination from Consumers on May 16, 2016. 5 Tr 79-80. In response to that notice, Hillman proposed to extend the PPA until after the Commission issues its decision in Case No. U-18090. According to Mr. Charles, Consumers rejected this proposal and sent a new, proposed PPA to Hillman. Mr. Charles testified that the parties met to discuss the proposed PPA and Hillman again requested that the existing PPA be extended. Mr. Charles stated that Hillman made comments on the proposed PPA; however, Consumers had not yet responded at the time Mr. Charles filed his testimony. 5 Tr 81.

According to Mr. Charles, given the uncertainty about the proposed changes to the PPA, the time needed to negotiate a new agreement may be extensive, from nine months to over one year. And the time could be longer unless Consumers withdraws a condition that Hillman enter into an interconnection agreement with the Midcontinent Independent System Operator, Inc. (MISO) and the Michigan Electric Transmission Company (METC), noting that approval by the Federal Energy Regulatory Commission (FERC) “could take in excess of 460 days as indicated in a FERC order issued on January 3, 2017 in FERC Docket No. ER17-156-000. See Exhibit IPPC-4[.]” 5 Tr 81-82.

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<sup>4</sup> Mr. Charles testified that he is responsible for overseeing the PPA between Hillman and Consumers.

Mr. Charles indicated that the timing of the Commission decision in Case No. U-18090 is uncertain and that several avoided costs, including line loss, reduced air emissions, and hedging value are not addressed in the proceeding. In addition, Mr. Charles testified that the Commission's order could be appealed and the avoided cost determination could be stayed. As a result, the implementation of new avoided costs could take several years. 5 Tr 82.

Mr. Charles opined that the current PPA has served the parties well for over 32 years and that the agreement is "evergreen," meaning that the term of the contract is indefinite unless one of the parties exercises the option to terminate the agreement. In light of the uncertainty surrounding new avoided costs, Mr. Charles recommended "that the existing PPA be extended until six months after the final, non-appealable, determination of full avoided cost rates, to allow the parties to finalize the agreement and obtain Commission approval." 5 Tr 83.

Mr. Charles testified that that if a new agreement is not reached, Hillman will have to close its facility, 77 jobs will be eliminated, along with \$24 million in local economic activity in the form of taxes, payroll, and purchases of local goods and services. Mr. Charles added that closure of the Hillman facility will have effects on forest health and stewardship, waste disposal, and 18 megawatts (MW) of baseload generation will also be lost. 5 Tr 83-84.

Nelson P. Turcotte, President—Northwoods Hydropower, Inc., testified on behalf of IPPC regarding the harm to the Alverno Hydroelectric Facility (Alverno) if its PPA with Consumers is terminated. Mr. Turcotte stated that Consumers' original PPA with Alverno is dated October 15, 1983, and has been in force since that time with various amendments. Mr. Turcotte testified that the current PPA continues indefinitely until either party provides a 12-month termination notice. 5 Tr 102. Mr. Turcotte stated that Alverno received a termination letter from Consumers indicating the company's intent to terminate the contract on December 31, 2017.

Mr. Turcotte stated that in response to Consumers' termination notice, Alverno sent a mandatory purchase letter to Consumers, but no answer was received. According to Mr. Turcotte, the negotiation of a new contract could take months or a year or more, and if the PPA ends before a new contract is negotiated, Alverno may have to cease operations.

Mr. Turcotte testified that Black River Limited Partnership (Black River), the owner of Alverno, has invested approximately \$325,000 in repairs and upgrades, and another \$250,000 in co-investments with Tower Kleber LP dams. Mr. Turcotte explained that ongoing capital expenditures in Alverno will require \$1.3 million over the next 10 to 20 years, requiring the certainty of a long-term financing, which can only be secured with a long-term contract. 5 Tr 106-107.

Mr. Turcotte provided examples of the benefits of the Alverno dam to the public, including preventing the passage of invasive species, controlling water levels, preventing flooding and erosion, and sustaining fish populations. Mr. Turcotte added that the Alverno facility plays a key role in maintaining the Black River Sturgeon Hatchery Facility and that the dam helps support local property values, taxes, and tourism. 5 Tr 107-109.

Victor Leabu, President of White's Bridge, testified on behalf of IPPC about the hardship that will result to White's Bridge if Consumers cancels its contract with the company. Mr. Leabu testified that White's Bridge purchased and restored an abandoned hydroelectric facility in 1982. In 1984, the facility went on line and White's Bridge entered into a PURPA contract with Consumers, which is due to end on May 31, 2017, pursuant to a termination letter from Consumers received on December 14, 2015. 5 Tr 118-119.

Mr. Leabu testified that the taxes paid by White's Bridge are important to the local economy and that White's Bridge pays for a National Weather Service gauging station upstream from the

dam. *Id.* According to Mr. Leabu, in response to Consumers' termination letter, White's Bridge offered to extend its current contract or negotiate a new PPA. 5 Tr 119-120. Mr. Leabu testified that Consumers rejected the offer to extend the existing PPA and instead offered a new agreement. Mr. Leabu indicated that on January 20, 2017, he informed Consumers that he had significant concerns with the proposed PPA:

including, but not limited to: the short (5-year) duration of the PPA; the fact that both the energy and capacity related avoided cost structures, and thus payments, were to be based on MISO market values and provisions; the requirements that all Emission Allowances and Environmental Attributes derived from White's Bridge Hydro's Plant be bundled with the Delivered Energy and thus transferred without separate compensation to Consumers; and that White's Bridge Hydro would be prohibited from entering into a long-term contract with Consumers, due to the requirement that avoided cost rates be adjusted every two years. The proposed PPA is not based in any part on the most recent Avoided Cost ruling issued by the MPSC in 1982 upon which our current contract is based.

5 Tr 120. Mr. Leabu continued, asserting that the proposed payments for energy and capacity in Consumers' proposed PPA are approximately half of what White's Bridge is receiving under its current contract, opining that such a substantial decrease in payments would result in the company having to shut down operations and abandon the dam, leaving future dam maintenance to the State. 5 Tr 121.

Mr. Leabu testified that White's Bridge is seeking a minimum 20-year contract at full avoided costs for energy and capacity at the facility. According to Mr. Leabu, a longer contract is necessary to allow White's Bridge to obtain financing in order to continue to operate and maintain the facility. Finally, Mr. Leabu asserted that the original PPA with Consumers took six months to negotiate, and White's Bridge is requesting an extension of the current contract to allow the parties to negotiate a new PPA based on the Commission's most recent avoided cost order. 5 Tr 122.

David F. Ronk, Executive Director of Transactions and Wholesale Settlements in Consumers' Energy Supply Operations Department, testified that Consumers' notices to terminate the PPAs

with Hillman and White's Bridge were an exercise of the company's rights under the contracts to terminate the PPAs pursuant to notice. Mr. Ronk averred that Consumers has consistently acknowledged its purchase obligations under PURPA and claimed that Consumers was engaged in efforts to negotiate new contracts with these facilities. 5 Tr 136-137.

Mr. Ronk described Consumers' efforts to enter into a new PPA with Hillman, noting that the company sent a notice of election to terminate the contract on December 15, 2014, followed up by the provision of a proposed replacement PPA in January 2015. Mr. Ronk testified that the parties met in April and June 2015, to discuss the terms of the proposed contract. According to Mr. Ronk, "the parties became aware that new avoided costs may be determined by the MPSC in the near future and therefore, shifted focus from a new PPA to a PPA extension." 5 Tr 137. Subsequently, the parties met to discuss a one-year extension and then a 17-month extension. On December 2, 2015, Hillman made a counteroffer to the proposed 17-month contract extension, and an amended PPA was executed on December 14, 2015. Mr. Ronk testified that on May 16, 2016, consistent with the terms of the amended PPA, Consumers sent notice of its election to terminate the agreement on May 31, 2017, while indicating that the company was willing to enter into a new PPA at Consumers' avoided costs. 5 Tr 137-138. Consumers proposed a 5-year PPA at current rates, which would be updated to the avoided capacity and costs determined by the Commission at the conclusion of Case No. U-18090. Mr. Ronk stated that the proposed PPA contained a provision that would allow Hillman to terminate the contract at the completion of the MISO Planning Resource Auction (PRA) for the planning year. Mr. Ronk testified that Consumers offered Hillman a Limited Agency Agreement (LAA) that would allow Hillman to offer capacity into the PRA. According to Mr. Ronk, Hillman rejected the agreement. 5 Tr 138-139.



With respect to White's Bridge, Mr. Ronk testified that negotiations and proposed contracts were similar to those undertaken or offered with Hillman. As was the case with Hillman, Consumers offered, and White's Bridge accepted, a two-month extension (until July 31, 2017) to the existing PPA. 5 Tr 140. Mr. Ronk stated that Consumers believes that its negotiations with Hillman and White's Bridge were reasonable, and the company's decision to terminate the agreements with these parties was based on the fact that the PPA rates no longer reflect Consumers' avoided costs. Mr. Ronk opined that the continuation of the current agreements with Hillman and Consumers "would subject the Company's customers to excessive and unreasonable costs." 5 Tr 142. Mr. Ronk added that it would be unreasonable to extend the contracts with Hillman and White's Bridge beyond July 31, 2017, because additional time is not required to reach agreements on new PPAs, and more time would continue to subject customers to unreasonable rates. *Id.*

Mr. Ronk took issue with Mr. Charles' characterization of the negotiations between the parties, claiming that Hillman's comments on Consumers' proposed PPA could not be construed as an actual counteroffer, and that Hillman indicated that the only avoided cost rates it would consider were those IPPC was recommending in Case No. U-18090. Mr. Ronk contended that IPPC was the only party to that case advocating approval of the method it proposed. 5 Tr 142-143.

Mr. Ronk also disputed Mr. Charles' claim that it may take more than one year to negotiate a new PPA, contending that in his (Mr. Ronk's) experience, a PPA like the one for Hillman could be executed in a matter of weeks, especially if the new agreement is modeled after the Standard Offer tariff. 5 Tr 143.

Mr. Ronk confirmed that Consumers did request that Hillman enter into an interconnection agreement with MISO and METC, explaining that at the time Consumers and Hillman entered into

the existing PPA, Consumers owned the transmission system to which Hillman delivers energy. Subsequently, Consumers sold the transmission system to METC, and therefore Hillman will need to enter a new agreement with MISO and METC. Mr. Ronk added that for generators with agreements that predate the sale of the transmission asset, METC and MISO assumed the existing interconnection agreement. Thus, for a new PPA, Consumers made it a condition that Hillman execute an interconnection agreement with METC and MISO. Mr. Ronk noted that if there were no new interconnection agreement with METC in place when a new PPA is executed, Hillman will need to negotiate an interim arrangement with METC. 5 Tr 145.

With respect to proposed avoided costs for a new PPA, Mr. Ronk contended that the company provided sufficient information in Case No. U-18090 for the Commission to adopt the company's proposed avoided cost rates. Mr. Ronk added that the parties to the U-18090 proceeding had set a schedule that would allow the Commission to issue an order in May 2017, leaving sufficient time for Consumers and Hillman to negotiate a new PPA before July 31, 2017. Mr. Ronk rejected Mr. Charles' recommendation to extend the current PPA to six months after a final, non-appealable order on avoided costs, noting that this would only encourage appeals of the Commission's order in Case No. U-18090, and it would require Consumers' customers to continue to pay unreasonable rates. 5 Tr 146. Mr. Ronk testified that Hillman is paid approximately \$10.3 million per year for energy and capacity under the current PPA. 5 Tr 147.

Mr. Ronk disputed Mr. Leabu's claims concerning contract negotiations with White's Bridge. According to Mr. Ronk, the contract extension that Consumers offered White's Bridge, which was rejected in January 2017, contained the same terms and avoided costs as the current PPA. As is the case with Hillman, Mr. Ronk claimed that a new PPA, based on the avoided costs approved in Case No. U-18090, could be negotiated in a matter of weeks, rather than months. In addition,

Mr. Ronk pointed out that Consumers has offered to make available the Standard Offer to facilities the size of White's Bridge, which could further simplify negotiations. 5 Tr 147-149.

Mr. Ronk disagreed with Mr. Turcotte's contention that the PPA for Alverno dam has no set end date, testifying that the contract with Black River contains the same 12-month notice provision for termination that the contracts with White's Bridge and Consumers contain. Mr. Ronk agreed with Mr. Turcotte's claim that no PPA extension or replacement contract for Alverno has been offered, explaining that the Black River PPA ends on December 31, 2017, leaving sufficient time to negotiate a new PPA based on the avoided costs approved in Case No. U-18090. 5 Tr 151.

In rebuttal, Mr. Charles contended that Consumers is not in fact attempting to negotiate a new PPA with Hillman, noting that the company's proposed avoided cost rates are the same as the company proposed in Case No. U-18090, and that those rates have been opposed by every party in that proceeding. 5 Tr 87. Mr. Charles listed a number of actions and omissions by Consumers in the context of negotiating a new contract that Mr. Charles claimed were evidence of bad faith on the part of the utility. Mr. Charles also disputed Mr. Ronk's characterization of the interactions between the parties.

Concerning the LAA that Consumers offered Hillman, Mr. Charles observed that the QF had very little time to examine or respond to the offer, and Mr. Charles opined that "Consumers' LAA was an attempt to evade its duties under PURPA and place its responsibilities on the QF. It was a backdoor attempt to force Hillman into the MISO market, despite the fact that Consumers lacks a FERC waiver to allow such a requirement." 5 Tr 90.

Mr. Charles reiterated that there is no need to terminate the current PPA, when the agreement could simply be amended to update the avoided cost rates. Mr. Charles added that Hillman had requested a one-year extension of the current PPA to allow the parties to negotiate a new

agreement, noting that appropriate avoided capacity and energy costs are only one of the issues the parties are attempting to negotiate. 5 Tr 91-92. Mr. Charles contended that the parties require far more time to negotiate a new PPA and that Hillman's plans for future investments are put at risk if there is not time for negotiations before the existing PPA ends.

Mr. Charles testified that Hillman, METC, Consumers, and MISO discussed the need for a new interconnection agreement and the parties agreed that if Hillman only sells power to Consumers, no new interconnection agreement would be required. Thus, "Consumers' arguments on this point are a red herring." 5 Tr 94. Finally, Mr. Charles pointed out that despite Mr. Ronk's claims about how quickly a PPA can be executed, Hillman and Consumers have been negotiating a new PPA for over two years and have not reached an agreement.

In rebuttal, Mr. Turcotte opined that, contrary to Mr. Ronk's claims, Consumers' customers are not overpaying for energy and capacity from Alverno and that Consumers' current and proposed avoided costs are too low. Mr. Turcotte urged the Commission to provide oversight and ensure that non-discriminatory avoided costs continue to be paid until new avoided costs are approved. Mr. Turcotte agreed with Mr. Charles that a new PPA could not be executed in a matter of a few weeks, noting that there are several issues beyond avoided costs that must be negotiated.

In rebuttal testimony, Mr. Leabu disputed Mr. Ronk's claim that Consumers sent White's Bridge a contract extension. According to Mr. Leabu, Consumers, in fact, sent a new contract of a short term, based entirely on MISO market prices for energy and capacity, and which contained many terms that White's Bridge considered contrary to the requirements of PURPA. 5 Tr 126-127. Mr. Leabu testified that:

Consumers' offer to White's Bridge would have resulted in less revenue to White's Bridge and required conceding key issues from the avoided cost docket, U-18090. Consumers must have known that such an offer was both not responsive to White's Bridge's request for an extension under the existing terms, and could not be

accepted. Consumers cannot, then, plausibly use this as an example of good faith negotiation with White's Bridge. Furthermore, a two-month extension of White's Bridge's current contract was not either a good faith negotiation of a new contract, nor an extension long enough to ensure that the parties would be able to put such a new contract into place before another extension is necessary.

5 Tr 128. Mr. Leabu reiterated that it could take longer than six months to negotiate a new agreement. *Id.*

### Positions of the Parties

IPPC argues that PURPA establishes a legally enforceable obligation (LEO) that requires Consumers to purchase the power offered by a QF, and utilities cannot avoid that obligation through delaying or refusing to sign a contract. *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006, P 36 (2011) (*Cedar Creek*). IPPC observes that Consumers can only be exempted from its purchase obligation through a FERC-approved waiver that determines that the QF has non-discriminatory access to a market. Although Consumers has obtained a waiver from the requirement that it purchase from QFs larger than 20 MW, the obligation remains in force for QFs smaller than 20 MW. Thus, IPPC maintains that Consumers' refusal to enter into contracts with Hillman and White's Bridge violates PURPA.

IPPC further argues that Consumers is refusing to negotiate in good faith with members of IPPC. IPPC points to Mr. Charles' testimony that the terms of the proposed PPAs include the same avoided capacity and energy costs and terms that Consumers is advocating in Case No. U-18090. According to IPPC, Consumers' avoided costs have been rejected by all of the parties in that proceeding, and that the terms Consumers is proposing "do not reflect Commission-approved avoided costs for Consumers, but instead represent the Company's litigating position. Consumers is thus using its position of market dominance to attempt to extract concessions from QFs on positions which the Commission has not endorsed." IPPC's initial brief, p. 9. IPPC

further highlights Mr. Charles' testimony that Consumers delayed providing a response to Hillman's counteroffer in an attempt to pressure Hillman to agree to the company's terms, and it points out that Consumers' proposal included a new requirement that Hillman post security in excess of \$2 million, limited the contract length to five years, assigned all renewable energy credits (RECs) to Consumers, and the proposal contained a one-sided indemnity provision, among other things. According to IPPC, the delays and bad-faith negotiating tactics undertaken by Consumers are precisely the kinds of tactics that PURPA was intended to prevent:

To that end, FERC has recently issued a declaratory order stating that "a requirement for a facilities study or an interconnection agreement, given that the utility can delay the facilities study or delay tendering an executable interconnection agreement, as a predicate for a legally enforceable obligation is inconsistent with PURPA and the Commission's regulations under PURPA."

IPPC's initial brief, p. 10, quoting *FLS Energy, Inc., et al.*, 157 FERC ¶61,211, P 20 (2016). Thus, IPPC contends that Consumers' attempts to impose additional conditions on Hillman and White's Bridge violate PURPA and FERC regulations.

Next, IPPC claims that the termination of existing PPAs, before the Commission sets new avoided cost rates, violates PURPA. IPPC argues that the most straightforward way to update the contracts with Hillman and White's Bridge would be to simply revise the existing PPAs with the rates the Commission determines in its final order in Case No. U-18090. Thus, IPPC disputes Mr. Ronk's contention that the only mechanism for entering into a new PPA is to end the existing one. IPPC stresses that should the existing agreement end without a replacement PPA in place, Hillman would be forced to close down with corresponding harmful effects on employees and the local economy.

Finally, IPPC points out that, pursuant to PURPA and the FERC's rules and orders, the Commission has the authority to determine whether a LEO exists. Quoting *Cedar Creek, supra*,

P 32, IPPC contends that by the fact that its members have committed to selling power to Consumers an enforceable, legal obligation has been created.

In reply, Consumers contends that IPPC has not presented any evidence in this case to demonstrate that the company has violated PURPA. Consumers argues that the notices sent to Hillman, White's Bridge, and Black River were proper and in accordance with the terms of the contracts, and that sending such notice was not a violation of PURPA, nor was it an indication that the company is seeking to avoid its obligations. Consumers posits that the only means to reach a new agreement, using updated avoided costs, is to end the existing agreement.

Consumers further replies that IPPC's arguments concerning an LEO with any of the QFs is premature because the company currently has PPAs with all members of IPPC. Consumers also contests IPPC's claim that the existing contracts could simply be continued and then updated when new avoided costs are determined in Case No. U-18090. According to Consumers, the existing PPAs do not contain any provision that would allow costs to be updated. Consumers stresses that it did offer new five-year contracts to Hillman and White's Bridge that would continue the current avoided cost amounts until new avoided costs are determined. Finally, Consumers disputes IPPC's claim that the company is refusing to negotiate in good faith, citing extensive testimony supporting its efforts to reach new agreements.

Consumers argues that Count I of IPPC's amended complaint should be dismissed because IPPC's members have contracts in place; thus, IPPC cannot demonstrate that Consumers has violated PURPA. Consumers points to Mich Admin Code, R 792.10446, which provides that the complainant, IPPC, has the burden of proof. In this instance, Consumers contends that all of IPPC's members have contracts with Consumers and the company is actively pursuing new PPAs with Hillman and White's Bridge on the basis of new avoided cost rates to be determined in Case

No. U-18090. Consumers claims “any potential violation of PURPA would not actually occur unless Consumers Energy breached its PPAs with the QFs or failed to contract with the QFs. Thus, the arguments alleged in this Complaint are hypothetical at best and IPPC does not have standing to bring this Complaint.” Consumers’ initial brief, p. 5. Consumers cites the injury-in-fact requirement for standing under *Association of Data Processing Service Organizations, Inc v Camp*, 397 US 150, 90 SCt 827, 25 LEd 2d 184 (1970), *Drake v Detroit Edison Co*, 453 F.Supp. 1123 (W.D. Mich 1978), and the May 17, 1991 order in Case No. U-9804, contending that IPPC’s claimed injuries are hypothetical, thus there is no justiciable controversy.

Next, Consumers asserts that under PURPA, it has a right to negotiate contracts with IPPC members, and that the Commission has approved those contracts as part of its role in overseeing PURPA. With respect to Hillman, White’s Bridge, and the Alverno dam, Consumers points to exhibits containing the original contracts with these facilities, which provide that after the initial contract term, either party may terminate the agreement in accordance with certain notice provisions. Thus, Consumers asserts that notification of Hillman, White’s Bridge, and Alverno was proper pursuant to a bargained-for provision in the contract.

Finally, Consumers argues that it has been engaged in negotiating new PPAs with Hillman and White’s Bridge since 2014, and has extended the current contracts with these facilities. Consumers points to extensive testimony by Mr. Ronk detailing the company’s efforts to arrive at new agreements that reflect Consumers’ avoided costs for energy and capacity. Consumers notes that because its current PPA with Alverno ends in December, it is awaiting final avoided cost rates to be determined in Case No. U-18090 before negotiating a new PPA. Thus, Consumers urges the Commission to reject IPPC’s request for an unspecified and unlimited extension to the existing PPAs.



In reply, IPPC points out that the Commission has already determined that IPPC has standing to bring this complaint, quoting from the January 31 order wherein the Commission found that there was indeed potential for harm to Hillman and White's Bridge if the PPA extension period were to end without a new agreement in place. Accordingly, IPPC contends that Consumers' request that the Commission dismiss the complaint should again be disregarded. IPPC further argues that Consumers' assertions about its right to terminate the current contracts are not responsive to IPPC's claims in Count I of the complaint. IPPC reiterates that it is asking that the current PPAs continue until new PPAs, using new avoided costs, are negotiated. IPPC quotes the FERC's decision in *Virginia Electric Power Company*, 151 FERC ¶61,038 (2015), for the proposition that a utility cannot avoid an LEO to purchase energy and capacity from a QF, simply by refusing to sign a contract. Thus, "IPPC continues to assert that Consumers' termination of the current IPPC members' contracts in lieu of replacement, long-term contracts, violates PURPA and FERC Orders." Accordingly, IPPC contends, "the Commission must exercise its authority and enforce the current contractual provisions, including the current energy and capacity avoided costs, until such time as replacement contracts are entered into." IPPC's reply brief, p. 6. IPPC adds that the current month-to-month extensions are harmful to the affected QFs because these facilities are unable to undertake long-term planning with a potential contract expiration deadline.

Finally, IPPC urges the Commission to be mindful of any potential discrimination against certain QFs. IPPC observes that although Consumers claims that contract negotiations with IPPC members are difficult while avoided costs are pending, the company has not had the same problems with other QF PPAs. IPPC points to the differences in avoided costs, contract lengths, and other demands made to Hillman and White's Bridge compared to a recent PPA amendment that Consumers filed in Case No. U-18392, for a company-affiliated QF. IPPC avers that, "Such

differences include how the avoided cost rates are calculated (including what inputs are used), use of a long-term amendment vs. termination and short-term month-to-month extensions, and no imposition of new interconnection or security requirements on its affiliate, to name a few.”

IPPC’s reply brief, p. 8.

The Staff observes that on May 31, 2017, the Commission issued an order in Case No. U-18090 stating that a final order on Consumers’ avoided costs would be issued on July 12, 2017. The Staff maintains that this only gives Hillman and White’s Bridge two weeks, from July 12 to July 31, 2017, to negotiate a new PPA based on the approved avoided costs. The Staff therefore recommends that the Commission encourage the parties to extend the current contract until September 30, 2017, that the parties provide a progress report to the Commission by the end of August, and that the Commission retain jurisdiction to reopen the matter if the parties cannot reach an agreement.

In reply, IPPC asserts that the Staff’s remedy, essentially a two-month extension, is inadequate and will simply maintain the near-untenable position that Hillman and White’s Bridge find themselves in now. IPPC reiterates that the Commission should exercise its authority under PURPA “to create a ‘legally enforceable obligation’ on Consumers to continue its current contracts with Hillman, White’s Bridge and Black River, until mutually-agreeable amendments to their respective PPAs, or mutually-agreeable new PPAs, can be entered into.” IPPC’s reply brief, p. 10.

### Discussion

Pursuant to 18 CFR § 292.304(d), “each qualifying facility shall have the option . . . to provide energy or capacity [to an electric utility] pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term . . . based on either . . . the [utility’s] avoided

costs calculated at the time of delivery [,or] . . . calculated at the time the obligation is incurred.” The FERC has expressly delegated to the states the responsibility to determine whether a QF has incurred a legally enforceable obligation to deliver power and, if so, when the obligation arose. *See*, FERC Order 688 (2006).

However, in this case, the existence of an LEO is not yet at issue because, as Consumers points out, all of IPPC’s members currently have PPAs with Consumers or, in the case of Hillman and White’s Bridge, agreements to extend the current PPAs, and those agreements are being honored. And, as set forth in its testimony and briefs, Consumers recognizes that it has an obligation to purchase from certain QFs. Thus, a determination that Consumers has an LEO to purchase from IPPC members is unnecessary at this time.

Due to the timing of the expiration dates for the Hillman and White’s Bridge PPAs, coupled with the ongoing proceeding to determine new avoided costs for Consumers in Case No. U-18090, the Commission finds that some interim relief for Hillman and White’s Bridge is warranted. The Commission finds persuasive the testimony by Mr. Charles and Mr. Leabu that the issues involved in negotiating a new PPA go beyond establishing avoided costs for energy and capacity, and these additional matters will require more discussion after the Commission approves new avoided energy and capacity costs.<sup>5</sup> However, the Commission rejects IPPC’s request to extend the current contracts until final, unappealable rates are determined in Case No. U-18090.

Accordingly, the Commission agrees with the Staff that the most reasonable course of action is to direct the parties to continue the current agreements, including current avoided capacity and

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<sup>5</sup> The Commission notes that the requests to extend the current contracts with Hillman and White’s Bridge until July 31, 2017, have been filed in Case No. U-18027. In light of the Commission’s decision to maintain the status quo until such time as the parties have reached agreements on new PPAs based on new avoided costs, the Commission finds that approvals of contract extensions for White’s Bridge and Hillman are unnecessary.

energy costs, until such time as they arrive at new agreements. The Commission declines to set any specific time period on the extension but it does expect negotiations to proceed expeditiously, with both parties acting in good faith. The Commission also agrees that an update on the status of the negotiations, beginning at the end of September, shall be provided to the Staff, and the Commission retains jurisdiction over this matter, in the event the parties reach an impasse. If, by October 30, 2017, the parties have not made substantial progress toward reaching new agreements, Consumers, Hillman, and White's Bridge shall request the assistance of the Staff in resolving any remaining issues and moving the negotiations forward to resolution.

THEREFORE, IT IS ORDERED that:

A. The power purchase agreements that are currently in effect between Consumers Energy Company and Hillman Power Company, LLC, and Consumers Energy Company and White's Bridge Hydro Co. shall continue in effect until the parties reach and execute new agreements.

B. Consumers Energy Company, Hillman Power Company, LLC, and White's Bridge Hydro Co. shall report to the Commission Staff on the status of the contract negotiations on September 29, 2017, if no agreements have been reached at that time.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so by the filing of a claim of appeal in the Michigan Court of Appeals within 30 days of the issuance of this order, under MCL 462.26. To comply with the Michigan Rules of Court's requirement to notify the Commission of an appeal, appellants shall send required notices to both the Commission's Executive Secretary and to the Commission's Legal Counsel. Electronic notifications should be sent to the Executive Secretary at [mpscedockets@michigan.gov](mailto:mpscedockets@michigan.gov) and to the Michigan Department of the Attorney General - Public Service Division at [pungpl@michigan.gov](mailto:pungpl@michigan.gov). In lieu of electronic submissions, paper copies of such notifications may be sent to the Executive Secretary and the Attorney General - Public Service Division at 7109 W. Saginaw Hwy., Lansing, MI 48917.

MICHIGAN PUBLIC SERVICE COMMISSION

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Sally A. Talberg, Chairman

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Norman J. Saari, Commissioner

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Rachael A. Eubanks, Commissioner

By its action of July 12, 2017.

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Kavita Kale, Executive Secretary